

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Rachael L. Nash; Sarah E. Nash; Rachael N. Lee

OBJECTOR: Cooney Brothers Family Partnership

CASE 40A-0187-R-2022

40A 109346-00

40A 109352-00

40A 109353-00

40A 109367-00

40A 113110-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

The above-captioned claims appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. The claims are

owned by Sarah Nash. Claims 40A 109346-00, 40A 109352-00, and 40A 109353-00 are co-owned by Rachael Nash. Claim 40A 109367-00 is co-owned by Rachael Lee. Claims 40A 109346-00, 40A 109352-00, 40A 109353-00, and 40A 109367-00 received objections from Cooney Brothers Family Partnership. Claims 40A 109346-00, 40A 109367, and 40A 113110-00 received issue remarks regarding amendments filed prior to the issuance of the Basin 40A Preliminary Decree.

FINDINGS OF FACT

Priority Date Objections

1. Cooney Brothers objected to the priority dates of claims 40A 109346-00, 40A 109352-00, 40A 109353-00, and 40A 109367-00.

2. On May 31, 2022, Objector withdrew their objections to the priority dates.

40A 109346-00

3. Claim 40A 109346-00 appeared in the Basin 40A Preliminary Decree as a claim for stock drinking from a spring in the SWNESW of Section 28, T6N, R15E, Wheatland County.

4. The claim received the following issue remarks:

AN AMENDMENT WAS SUBMITTED ON 08/30/2018 REQUESTING TO AMEND THE PLACE OF USE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED BY THE COURT AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

AN AMENDMENT WAS SUBMITTED ON 08/30/2018 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

5. The amendment requests the point of diversion and place of use be modified as follows:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	NESENE	SWNESW	28	6N	15E	WHEATLAND

6. Claimants own the entirety of Section 28, T6N, R15E, Wheatland County.

7. Cooney Brothers objected to the period of diversion and period of use. The claim was decreed with a period of diversion and period of use from April 1 to December 31. The objection requests the period of diversion and period of use be modified to year-round. This is consistent with livestock drinking directly from the source and is supported by the information provided by Claimants and in the claim file.

40A 109352-00

8. Claim 40A 109352-00 appeared in the Basin 40A Preliminary Decree as a claim for stock drinking from a spring in the NESWSW of Section 18, T6N, R16E, Wheatland County.

9. Cooney Brothers objected to the period of diversion and period of use. The claim was decreed with a period of diversion and period of use from April 1 to December 31. The objection requests the period of diversion and period of use be modified to year-round. This is consistent with livestock drinking directly from the source and is supported by the information provided by Claimants and in the claim file.

40A 109353-00

10. Claim 40A 109353-00 appeared in the Basin 40A Preliminary Decree as a claim for stock drinking from a spring in the NWNWSE of Section 7, T6N, R16E, Wheatland County.

11. Cooney Brothers objected to the period of diversion and period of use. The claim was decreed with a period of diversion and period of use from April 1 to December 31. The objection requests the period of diversion and period of use be modified to year-round. This is consistent with livestock drinking directly from the source and is supported by the information provided by Claimants and in the claim file.

40A 109367-00

12. Claim 40A 109367-00 appeared in the Basin 40A Preliminary Decree as a claim for stock drinking from a spring in the SESENW of Section 12, T5N, R15E, Sweet Grass County.

13. The claim received the following issue remarks:

AN AMENDMENT WAS SUBMITTED ON 08/30/2016 REQUESTING TO AMEND THE PLACE OF USE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED BY THE COURT AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

AN AMENDMENT WAS SUBMITTED ON 08/30/2016 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

14. The amendment requests the point of diversion and place of use be modified as follows:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	NESWNE	SESENW	12	5N	15E	SWEET GRASS

15. Claimants own the N2 of Section 12, T5N, R15E, Sweet Grass County.

16. Cooney Brothers objected to the period of diversion and period of use. The claim was decreed with a period of diversion and period of use from April 1 to December 31. The objection requests the period of diversion and period of use be modified to year-round. This is consistent with livestock drinking directly from the source and is supported by the information provided by Claimants and in the claim file.

40A 113110-00

17. Claim 40A 113110-00 appeared in the Basin 40A Preliminary Decree as a domestic claim for a spring in the NENENW of Section 4, T5N, R15E, Sweet Grass County.

18. The claim received the following issue remark:

AN AMENDMENT WAS SUBMITTED ON 08/30/2016 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

19. The amendment requests the point of diversion be modified as follows:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	SESESW	NENENW	4	5N	15E	SWEET GRASS

20. This modification matches the point of diversion to the place of use.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. The party seeking to overcome the prima facie status of a Statement of Claim bears the burden of proof; this burden also applies to a claimant's objection to his own claim. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

9. After the issuance of a temporary preliminary decree and close of the objection period in a basin, a claimant may amend their Statement of Claim. Section 85-2-233(6), MCA.

10. A claimant asserting an amendment to its claim has the burden to show that the historical use of the claim is accurately reflected by the requested amendment. *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558.

CONCLUSIONS OF LAW

Priority Date Objections

1. Objector withdrew their objections to the priority dates of claims 40A 109346-00, 40A 109352-00, 40A 109353-00, and 40A 109367-00.

40A 109346-00

2. Claimants overcame the prima facie status of claim 40A 109346-00 and showed by a preponderance of the evidence that the historically accurate location of the claimed spring is in the NESENE of Section 28, T6N, R15E, Wheatland County. The point of diversion and place of use should be modified accordingly. These modifications resolve the amendment issue remarks, and the remark should be removed from the claim abstract.

3. The parties overcame the prima facie status of claim 40A 109346-00 and showed by a preponderance of the evidence that the period of diversion and period of use should be year-round. The period of diversion and period of use should be modified to January 1 to December 31. These modifications resolve the objection to the period of diversion and period of use.

40A 109352-00

4. The parties overcame the prima facie status of claim 40A 109352-00 and showed by a preponderance of the evidence that the period of diversion and period of use should be year-round. The period of diversion and period of use should be modified to January 1 to December 31. These modifications resolve the objection to the period of diversion and period of use.

40A 109353-00

5. The parties overcame the prima facie status of claim 40A 109353-00 and showed by a preponderance of the evidence that the period of diversion and period of use should be year-round. The period of diversion and period of use should be modified to January 1 to December 31. These modifications resolve the objection to the period of diversion and period of use.

40A 109367-00

6. Claimants overcame the prima facie status of claim 40A 109367-00 and showed by a preponderance of the evidence that the historically accurate location of the claimed spring is in the NESWNE of Section 12, T5N, R15E, Sweet Grass County. The point of diversion and place of use should be modified accordingly. These modifications resolve the amendment issue remarks, and the remark should be removed from the claim abstract.

7. The parties overcame the prima facie status of claim 40A 109367-00 and showed by a preponderance of the evidence that the period of diversion and period of use should be year-round. The period of diversion and period of use should be modified to January 1 to December 31. These modifications resolve the objection to the period of diversion and period of use.

40A 113110-00

8. Claimants overcame the prima facie status of claim 40A 113110-00 and showed by a preponderance of the evidence that the historically accurate location of the claimed well is in the SESESW of Section 4, T5N, R15E, Sweet Grass County. The point of diversion and place of use should be modified accordingly. These modifications resolve the amendment issue remarks, and the remark should be removed from the claim abstract.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Rachael N. Lee
260 Blake Creek Rd
Judith Gap, MT 59453

Rachael L. Nash
Sarah E. Nash
PO Box 267
Harlowton, MT 59036

Service Via Electronic Mail:

Colleen Coyle
Coyle Law Firm
141 Discovery Drive, Suite 215
Bozeman, MT 59771
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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A

Water Right Number: 40A 109346-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RACHAEL L NASH
PO BOX 267
HARLOWTON, MT 59036 0267

SARAH E NASH
PO BOX 267
HARLOWTON, MT 59036

Priority Date: NOVEMBER 16, 1891

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: 6.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF FISH CREEK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESENE	28	6N	15E	WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: FLOWING

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NESENE	28	6N	15E	WHEATLAND

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A

Water Right Number: 40A 109352-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RACHAEL L NASH
PO BOX 267
HARLOWTON, MT 59036 0267

SARAH E NASH
PO BOX 267
HARLOWTON, MT 59036

Priority Date: MARCH 3, 1922

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: 6.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF FISH CREEK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWSW	18	6N	16E	WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: FLOWING

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NESWSW	18	6N	16E	WHEATLAND

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A

Water Right Number: 40A 109353-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RACHAEL L NASH
PO BOX 267
HARLOWTON, MT 59036 0267

SARAH E NASH
PO BOX 267
HARLOWTON, MT 59036

Priority Date: OCTOBER 25, 1899

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: 6.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF MUD CREEK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWSE	7	6N	16E	WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: FLOWING

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWNWSE	7	6N	16E	WHEATLAND

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A

Water Right Number: 40A 109367-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: SARAH E NASH
PO BOX 267
HARLOWTON, MT 59036

RACHAEL N LEE
260 BLAKE CREEK RD
JUDITH GAP, MT 59453 8002

Priority Date: OCTOBER 15, 1919

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: 6.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF SPRING CREEK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	12	5N	15E	SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: FLOWING

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NESWNE	12	5N	15E	SWEET GRASS

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A

Water Right Number: 40A 113110-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: SARAH E NASH
PO BOX 267
HARLOWTON, MT 59036

Priority Date: DECEMBER 31, 1928

Type of Historical Right: USE

Purpose (use): DOMESTIC

Flow Rate: 25.00 GPM

Volume: 2.00 AC-FT

Households: 1

Maximum Acres: 0.50

Source Name: SPRING, UNNAMED TRIBUTARY OF FISH CREEK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESESW	4	5N	15E	SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PUMP

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	0.50		SESESW	33	6N	15E	WHEATLAND

Total: 0.50